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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

PETER HELLMUTH EGGERT,
Petitioner,

vs.

STATE OF TEXAS,
Respondent.

On Petition For Writ Of Certiorari
To The Texas Eleventh Court Of Appeals
Sitting In Eastland, Texas

PETITION FOR WRIT OF CERTIORARI

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Petitioner, Pro Se

QUESTIONS PRESENTED

1. Can the Texas Appellate Courts simply ignore allegations and proof of deprivation of a person's constitutionally guaranteed right to an impartial jury in a criminal case under the Sixth Amendment to the Constitution of the United States?

2. Did the Texas Courts violate Petitioner's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States?

PARTIES TO THE PROCEEDING

Peter H. Eggert, a citizen of the United States and a resident of the State of Texas, is the petitioner.

The State of Texas is the named respondent in this petition. However, the Texas Eleventh Court of Appeals, sitting in Eastland, Texas, and the Texas Court of Criminal Appeals, as well as the 266th Judicial District Court of Erath County, Texas have implicating knowledge of merits of this petition.

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OPINIONS BELOW

The underlying action was prosecuted in the 266th Judicial District Court of Erath County, Texas. The Jury found Petitioner and his son guilty and the court assessed punishment. Petitioner timely appealed to the 11th Court of Appeals for the State of Texas, sitting in Eastland, Texas. The 11th Court of Appeals entered its opinion, affirming the trial court's judgment, on June 7, 2007.

After Petitioner filed his motion for rehearing, Petitioner filed, on July 5, 2007, a supplemental motion for rehearing with newly discovered evidence of Respondent's jury-tampering which the 11th Court of Appeals overruled on July 19, 2007. The Texas Court of Criminal Appeals, Texas' highest reviewing court for criminal cases, refused to consider Petitioner's subsequent Petition for Discretionary Review and denied Petitioner's Motion for Rehearing with proof of the State's violation of Petitioner's constitutional right to an impartial jury on April 3, 2008.

STATEMENT OF JURISDICTION

This petition is timely filed under Supreme Court Rule 13(1), and this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) because it asks to correct a wrong of constitutional dimension.[1]

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[1] *Smith v. Phillips*, 455 U.S. 209, 221 (1982).

STATEMENT OF THE CASE

In late 2003 and early 2004 Petitioner became involved as a *pro bono* investigator under the strict supervision of Texas licensed attorney, Jose Lopez,[2] in an attempt to help Marcus Gallardo, a legal permanent resident, from being deported.

After meetings with Erath County, Texas, Assistant District Attorney, Jason Cashon, Jose Lopez filed an application for *habeas corpus* under the newly enacted Texas Code of Criminal Procedure Art. 11.072.[3] The writ was ultimately denied by District Judge Donald Jones, 266th Judicial District Court of Erath County, Texas.

Jose Lopez then appealed the aforesaid denial to the 11th Court of Appeals in Eastland, Texas.[4] Additionally, Jose Lopez attempted to seek a pardon from the Governor of the state of Texas and conveyed to Petitioner that he wanted to obtain the cooperation of the victim and her mother. Through an acquaintance, Petitioner contacted LeeRoy Gaitan who was the chief of police of Dublin, Texas at the time Gallardo was prosecuted.[5] Gaitan readily agreed to help and signed a statement to present to the Texas Board of Pardons and Paroles.

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2 Texas State Bar No.: 24041358

3 Texas Code of Criminal Procedure Art. 11.072. Procedure in Community Supervision Case (Tex. 59th Leg., ch. 587, §1, eff. June 20, 2003).

4 *Gallardo v. State*, No. 11-04-00049-CR (Tex.App.-Eastland, Sept. 30, 2004, no pet.).

5 LeeRoy Gaitan had been asked to resign his position as Chief of Police for unrelated reasons prior to his meeting with Petitioner.

Furthermore, Gaitan expressed to Petitioner that he personally knew Kim Whiteley, the victim's mother, and indicated that the case against Gallardo had been "taken away" from him and that it contained many irregularities.

Based on LeeRoy Gaitan's statements and recollections, Petitioner prepared two drafts for affidavits to be presented to the victim and her mother. Gaitan then arranged a meeting between Petitioner and Kim Whiteley, at which time Petitioner handed the drafts for affidavits to her with the request that, if true, to have them signed and notarized. Immediately after Kim Whiteley left Petitioner's office, she contacted Jason Johnson, her attorney in a child custody case, who is a personal friend of Assistant District Attorney Jason Cashon. Cashon subsequently made arrangements for Kim Whiteley to meet with Texas Ranger Joe Hutson. Gaitan's first reaction after finding out that Kim Whiteley was meeting with the Texas Ranger was in asking Kim Whiteley not to mention any of his (Gaitan's) involvement in the case. When Kim Whiteley told Gaitan that she could not do that, Gaitan also arranged for a meeting with Texas Ranger Joe Hutson.

Immediately after the oral argument before the 11th Court of Appeals in Eastland, Texas, Jose Lopez was approached by Assistant District Attorney Jason Cashon and Texas Ranger Joe Hutson and was handed a subpoena to appear before the Grand Jury of Erath County.

Both, Jose Lopez and LeeRoy Gaitan were ultimately granted immunity by the Erath County, Texas District Attorney's Office.

On September 29, 2004, an indictment against Petitioner and his son, Mikel P. Eggert, was presented and filed with the 266th Judicial District Court of Erath County, Texas, under cause number CR 12013. The elected District Attorney, John Terrill, inexplicably recused himself and his assistant, Jason Cashon, on November 2, 2004, which resulted in the appointment of Special Prosecutor, Garry Lewellen by assigned Senior Judge David Cleveland. On March 22, 2005, two additional indictments (CR 12121 and CR 12122), alleging essentially the same facts, were presented and filed with the trial court.

On June 14, 2005, in cause number CR 12121, a Jury found Petitioner guilty of Criminal Conspiracy: Fabricating Physical Evidence, under Texas Penal Code § 15.02; 37.09(a)(2), and the assigned Judge David Cleveland sentenced him and his son to two (2) years confinement in a State Jail Division of the Texas Dept. of Criminal Justice probated for five (5) years, a fine of $5,000.00, attorney fees of $4,000.00, and 30 days in County Jail [App. "B"].[6]

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[6] With the special provisions that: "18. The Defendant shall not engage in the practice of law in any judicial proceeding in this State during the term of probation." and "19. The Defendant shall not give any legal advice or engage in the practice of law during the term of probation."

Note: In open court, Judge Cleveland specifically stated that the above restrictions applied to all jurisdictions, not only the state of Texas.

On July 14, 2005, Appellant filed a Motion for New Trial which, initially set for hearing on July 28, 2005, was subsequently re-scheduled with the trial court's Order Directing Production to August 19, 2005. Even though the Special Prosecutor failed to complete the testing of new evidence and/or release such evidence at the hearing,[7] as ordered by the trial court, Petitioner's Motion for New Trial was overruled on that date.

Petitioner next timely perfected his appeal to the Eleventh Court of Appeals of Texas, sitting in Eastland, Texas.

After Petitioner's recusal motion to the 11th Court of Appeals,[8] he presented several issues in his brief and in his reply to the State's brief:

"1. Was the evidence sufficient to support a guilty verdict for conspiracy to fabricate evidence, where statute contains an exception for work product, and the unsigned affidavits in this case were clearly work product?

2. Was the evidence legally and factually sufficient to support a guilty verdict for conspiracy to fabricate evidence, where the state had to prove the affidavits were prepared with the intent to alter the proceedings in the Court of Appeals, since the affidavits were not in the record, and could not have been considered by the Court?

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[7] Even though requested numerous times, such evidence was never returned to the trial court and was not included in the record submitted to the Court of Appeals.

[8] Due to the fact that, under Texas law, when the Indictment directly referred to the 11th Court of Appeals it became implicated and essentially ineligible for further ruling.

3. Was the evidence legally and factually sufficient to support a guilty verdict for conspiracy to fabricate evidence, where there was no evidence that appellant knew the statements in the affidavits were false at the time they were prepared?

4. Did the trial court err in refusing to submit an instruction on the work product defense?

5. In the event appellant's counsel did not properly request an instruction on the work product defense, does that constitute ineffective assistance of counsel?

6. Did the trial court abuse its discretion in denying appellant's motion for new trial, where appellant presented a tape recording that contradicted the testimony of one of the State's key witnesses?

7. Did the trial court err in denying the motion for new trial, without hearing evidence of whether the tape recording was authentic, after adjourning the hearing to allow the State to examine the recording, and ordering appellant to produce it?"

After oral argument,[9] the Court of Appeals affirmed the conviction; *see* Eggert v. State, No. 11-05-00234-CR (Tex.App.—Eastland, delivered June 7, 2007) (not designated for publication) [App. "A"].

Petitioner afterward timely filed his Appellant's Motion for Rehearing on June 22, 2007, and his Appellant's Supplemental Motion for Rehearing on July 5, 2007.[10] On July 6, 2007, the

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[9] By Appellant's attorney of record, Walter M. Reaves, TxSB 16644200.

[10] By Appellant, *Pro Se*; mailed on July 5, 2007, received by COA on July 9, 2007.

Eleventh Court of Appeals overruled Appellant's Motion for Rehearing.

On July 12, 2007, the Eleventh Court of Appeals granted Petitioner's Appellant's Motion to Extend Time to File Supplemental Motion for Rehearing; however, Petitioner's Supplemental Motion for Rehearing with the newly discovered evidence of the State's jury tampering [App. "F"] was overruled on July 19, 2007 [App. "C"]. Petitioner subsequently filed his Petition for Discretionary Review with Texas' highest criminal appellate court, the Texas Court of Criminal Appeals, timely on August 20, 2007; however, the Texas Court of Criminal Appeals refused to consider the Petition for Discretionary Review on February 14, 2008 and denied Petitioner's Motion for Rehearing on April 3, 2008.

ARGUMENT FOR GRANTING THE WRIT

This case bears all the hallmarks of being grant-worthy.

A. This case presents important jurisprudential and constitutional issues because Petitioner has been deprived of his constitutional guarantee to an impartial jury.

In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is presumptively prejudicial.[11] A Defendant's fundamental right to an impartial jury is manifested in the verbiage of the Sixth Amendment to the United States Constitution and is applicable to the states through the Due Process Clause of the Fourteenth Amendment.[12] Society is obligated to prosecute those who break its rules, but society may not break its own rules in the prosecution process.[13]

Texas Rule of Appellate Procedure 44.2(a) mandates a constitutional error to be reversible as follows:

> "... If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not

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11 *Remmer v. United States*, 347 U.S. 227 (1954).

12 *In re Oliver*, 333 U.S. 257, 273-74 (1948).

13 *Jones v. Thomas*, 491 U.S.376, 396 (1989).

> contribute to the conviction or punishment."

"A few constitutional rights are so integral to the operation of the system that inaction will not result in waiver. ... the [Texas] Court of Criminal Appeals has identified a separate class of rights which cannot be waived and the **deprivation of which may be raised for the first time on appeal**. Cases in which the court identified fundamental systemic rights include: *Ieppert v. State* [14] (ex post facto law); *Rabb v. State* [15] (**facial validity of statute**); *Kieschnick v. State* [16] (reasonable doubt instruction)." (*see Hawkins v. State*) [17] (emphasis added)..

Moreover, Judge Clinton in his concurring opinion in *Ex Parte Michael Goodman*[18] readily stated:

> "... I proposed what seemed an acceptable standard, suggesting we limit cognizability of federal constitutional claims:
> ".. to 'exceptional' constitutional defects so 'fundamental' as not to be susceptible to a determination of harm, such as

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14 *Ieppert v. State*, 908 S.W.2d 217, 220 (Tex. Crim. App. 1995).

15 *Rabb v. State*, 730 S.W.2d 751, 752 (Tex. Crim. App. 1987).

16 *Kieschnick v. State*, 911 S.W.2d 156, 162 (Tex.App.—Waco 1995, no pet.) (opinion on reh'g).

17 *Hawkins v. State*, 964 S.W.2d 767 (Tex. App.—Beaumont 1998).

18 *Ex Parte Michael Goodman*, 818 S.W.2d 383 (Tex. Crim. App. 1991).

> those identified in Rose v. Clark, 478 U.S. 570, 577-78, 106 S.Ct. 3101, 3106, 92 L.Ed.2d 460, 470 (1986). [footnote omitted.] It is only 'errors of this kind [that] justify collateral relief **no matter how long a judgment may have been final and even though they may not have been preserved properly in the original trial.'** Rose v. Lundy, 455 U.S. [509,] at 544, 102 S.Ct. [1198,] at 1217, 71 L.Ed.2d [379,] at 404 [(1982)]. (Stephens, J., dissenting) (footnotes omitted)." " (emphasis added).

The Texas Court of Criminal Appeals further held in *Jones v. State* [19], that:

> "Litigants are entitled to jurors who will be genuinely open-minded and persuadable, with no extreme or absolute positions regarding the credibility of any witness.";
>
> "The standard of review for errors of constitutional dimension is different from the standard for other errors.; and
>
> "The right embodied in the clause of U.S. Const. amend. VI is one that, under the Due Process Clause of U.S. Const. amend. XIV, states may not deny."

Here, the record shows that Petitioner had asked the Texas 11th Court of Appeals and was granted the submission of supplemental facts

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19 *Jones v. State*, 982 S.W.2d 386 (Tex. Crim. App.1998).

immediately after he had obtained proof of the deprivation of his right to an impartial jury. However, the Court of Appeals did not act thereupon and overruled Petitioner's motion without even a harm analysis or reasonable doubt finding.

B. Petitioner has provided irrefutable proof that a tampering with his jury panel has occurred which resulted in the unlawful seating of jurors in favor of the Special Prosecutor.

> Article 35.11, Tex. Code Crim. Proc., states:
>
> "... The clerk shall randomly select the jurors by a computer or other process of random selection and shall write or print the names, in the order selected, on the jury list from which the jury is to be selected to try the case. The clerk shall deliver a copy of the list to the State's counsel and to the defendant or his attorney."
>
> Article 35.20, Tex. Code Crim. Proc., provides:
>
> "In selecting the jury from the persons summoned, the names of such persons **shall be called in the order in which they appear upon the list** furnished the defendant. ..." (emphasis added)

In the case at bar, the trial court clerk adhered to the provisions of Art. 35.11, and created and delivered the required list (attached hereto as Appendix "G"); however, the trial court clerk did not pay any attention to the provisions of Art. 35.20., which resulted in an unlawful seating of the jury

panel.[20] Whether so instructed or by their own desire, persons biased in favor of the Special Prosecutor's case were seated in the first six rows of the panel.

An analysis and the detailed comparison list (attached hereto as Appendix "H") unmistakably shows that of the twelve seated jurors only two would have been qualified to be reached. Furthermore, of all the persons seated in the first three rows (1 to 21) of the panel, only three were designated as such in the official jury list, and none in the first row.

The unlawful placing of the panel resulted in the seating of jurors favorable to the state's case (including the daughter of a grand juror, the father of the elected, but recused, District Attorney, a cousin of the state's prime witness, the judge of the county court at law, and an overwhelmingly large group of local law-enforcement related persons) and caused severe and irreparable harm to Petitioner because, although Petitioner's counsel used all his strikes on persons who, if seated in accordance with the law would not have been reached, he could not eliminate all unlawfully seated and potentially biased jurors.

C. Petitioner avers that a conspiracy existed to deprive him from his inalienable right to an impartial jury.

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20 The distributed list was collected by the trial court clerk immediately after *voir dire*.

The ambiguous goings-on in this case since its instigation are of such unusually large proportions that they defy the probability of being mere coincidences. Such questionable activities range from the mysterious recusal of the elected district attorney and his assistant, to the refuted appointment of a Special Prosecutor by the assigned Judge, to the offering of a job to Petitioner's court-appointed attorney by the district attorney shortly before trial, to the unbelievable granting of immunity of two persons with or under whom Petitioner had worked, to the fact that Special Prosecutor, Garry Lewellen, acting extremely nervous during *voir dire*, recognized the elected D.A.'s father in the jury panel and withheld such from the trial court, to the fact that Petitioner's appointed attorney did not present any witnesses during trial (other than Petitioner and his son) even though subpoenas for some ten witnesses had been issued (but not delivered), to the puzzling shortening of the trial from 3 days to just 2 days, after seating of the jury.

After careful study of the transcripts and record, any responsible and prudent Person can only conclude that the events leading to Petitioner's conviction (and post-conviction period) are the result of a conspiracy to willfully and maliciously deprive Petitioner of his rights under United States and Texas law.

Petitioner avers that Assistant District Attorney Jason Cashon, under the direction of the powers that be, developed and pursued a stratagem to punish Petitioner for openly criticizing the way

the *Gallardo* case had been handled. This averment is even further manifested by the fact that Special Prosecutor Garry Lewellen has just now, after three years, set Cause No. CR 12122 for trial. This trial was originally set for the week of May 27, 2008, but is rescheduled to commence on August 25, 2008 because Garry Lewellen is trying to change the verbiage of the indictment without having to refer back to the Grand Jury.

Consequently, it is apparent that the conspiracy and/or deprivation of Petitioner's constitutional rights has become a superseding or intervening cause.

In its Report to the Supreme Court of Texas by the Task Force on Jury Assembly and Administration chaired by Judge David Peeples, dated February 2, 2007, it stated:

> "... Lawyers have expressed suspicion that in certain Texas counties there may be official tampering with the jury process behind closed doors, which tilts the process in favor of one litigant and against another. Such concerns were expressed publicly at a meeting of the Supreme Court Advisory Committee on May 2005. ..."

The Task Force further stated that while it was "aware of no hard proof of malevolent [jury] tampering" its members were made aware of such ongoing abuse of fundamental justice by some officials in some counties.

It is actually incredibly easy for determined officials to commit such tampering when considering

the procedure in a jury trial. The summoned panel is usually held outside the courtroom to avoid any contact with the parties. Chances are that within the 80 to 100 summoned persons there are some who are partial to the outcome of the trial (especially in small rural areas). The placing of such persons toward the front of the panel when filing into the courtroom is virtually undetectable, especially when the original and official jury list is collected immediately after *voir dire*.

Only after Petitioner obtained a copy of the list during the pending of the appeal in the Court of Appeals was he made aware of the jury tampering. Due to the severity of the deprivation of Petitioner's Sixth Amendment right and in order to obtain additional proof of the conspiracy against his rights, Petitioner has filed a Complaint and Request for Investigation with the Federal Bureau of Investigation and the U.S. Justice Department pursuant to 18 U.S.C. §241 and 18 U.S.C. §242.[21] [22]

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[21] Section 241 of Title 18 is the civil rights conspiracy statute. Section 241 makes it unlawful for two or more persons to agree together to injure, threaten, or intimidate a person in any state, territory or district in the free exercise or enjoyment of any right or privilege secured to him/her by the Constitution or the laws of the United States, (or because of his/her having exercised the same). Unlike most conspiracy statutes, Section 241 does not require that one of the conspirators commit an overt act prior to the conspiracy becoming a crime. The offense is punishable by a range of imprisonment.

[22] Section 242 of Title 18 is the Deprivation of Rights Under Color of Law provision. This provision makes it a crime for a person acting under color of law to willfully

Such investigation will undoubtedly substantiate Petitioner's averment and result in clarification as to the circumstances surrounding the jury list and the unlawful placing of potential jurors on the panel, as well as the actual seating of unqualified jurors.

D. Texas' higher courts have failed to uphold its duties under the Fourteenth Amendment of the Constitution of the United States.

> The verbiage of Section 1 of the Amendment:
> "...; nor deny to any person within its jurisdiction the equal protection of the laws."

suggests that, in order to assure that due process of law is applied in all criminal cases, the intermediate and higher appellate courts of Texas have the duty

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deprive a person of a right or privilege protected by the Constitution or laws of the United States.

For the purpose of Section 242, acts under "Color of Law" include acts not only done by federal, state, or local officials within their lawful authority, but also acts done beyond the bounds of that official's lawful authority, if the acts are done while the official is purporting to or pretending to act in the performance of his/her official duties. Persons acting under color of law within the meaning of this statute include police officers, prison guards and other law enforcement officials, as well as judges, and others who are acting as public officials. It is not necessary that the crime be motivated by animus toward the race, color, religion, sex, handicap, familial status or national origin of the victim.

The offense is punishable by a range of imprisonment up to a life term, or the death penalty, depending upon the circumstances of the crime, and the resulting injury, if any.

to act upon notice that a constitutionally guaranteed right has been violated. While unquestionably within the discretion of such courts to overrule, refuse, and/or deny petitions and motions, it must be a moral and ethical duty to act when it comes to important jurisprudential and constitutional issues which not only affect one person but an entire legal and fundamental cornerstone of society.

Unfortunately, in recent years and steadily increasing, the Texas higher criminal review courts have indicated a general dislike to jury issues and are actually frowning upon jury matters.

CONCLUSION

For the reasons shown, Petitioner urges the Court to send a clear message that the constitutional right for an impartial jury cannot be violated, even in the hinterland of Texas.

Petitioner prays that this petition for writ of certiorari be granted.

Respectfully submitted,

s/s (Peter H. Eggert)

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Petitioner, Pro Se

APPENDIX "A"

OPINION BY 11TH COURT OF APPEALS

App. 1

Opinion filed June 7, 2007

(Seal)

In the

Eleventh Court of Appeals

No. 11-05-00234-CR

PETER HELLMUTH EGGERT, Appellant

V.

STATE OF TEXAS, Appellee

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On Appeal from the 266th District Court
Erath County, Texas
Trial Court Cause No. CR 12121

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O P I N I O N

The jury convicted Peter Hellmuth Eggert of conspiracy to fabricate physical evidence, and the trial court sentenced him to two years confinement, probated for five years, and a fine of $5,000.
We affirm.

I. *Background Facts*

Peter Eggert and his son Mikel Peter Eggert were indicted for conspiracy to fabricate physical evidence by making, presenting, or using the purported affidavits of Kim Whiteley or M.W. with the knowledge that they were false and with the intent to affect an appeal pending in this court. The indictments were consolidated, and Peter and Mikel were tried together. The jury found both guilty, and the trial court assessed punishment at two years confinement and a $5,000 fine. The trial court probated the term of confinement for five years but not the fine.

II. *Issues*

Peter challenges his conviction with nine issues. These can be grouped into four areas:

- sufficiency of the evidence;
- charge error;
- ineffective assistance of counsel; and
- Peter's motion for new trial.

III. *Analysis*

A. Was the Evidence Legally and Factually Sufficient?

Peter's first three issues challenge the sufficiency of the evidence to support the jury's guilty verdict. Specifically, Peter contends the evidence was insufficient because the affidavits were work product and the statute contains a work-product exception, the affidavits could not have altered the underlying proceeding, and he did not know the affidavits were false at the time he prepared them.

In reviewing claims of legal sufficiency of the evidence, we review all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307 (1979); *Jackson v. State,* 17 S.W.3d 664 (Tex. Crim. App. 2000); *Clewis v. State,* 922 S.W.2d 126 (Tex. Crim. App. 1996). Due deference must be given to the fact-finder's determination, particularly concerning the weight and credibility of the evidence. *Johnson v. State,* 23 S.W.3d 1 (Tex. Crim, App. 2000); *Jones v. State,* 944 S.W.2d 642 (Tex. Crim. App. 1996).

To determine if the evidence is factually sufficient, the appellate court reviews all of the evidence in a neutral light. *Watson v. State,* 204 S.W.3d 404, 414 (Tex. Crim. App. 2006) (overruling in part *Zuniga v. State,* 144 S.W.3d 477 (Tex. Crim. App. 2004)); *Johnson,* 23 S.W.3d at 10-11; *Cain v. State,* 958 S.W.2d 404, 407-08 (Tex. Crim. App.

1997); *Clewis,* 922 S.W.2d at 129. Then, the reviewing court determines whether the evidence supporting the verdict is so weak that the verdict is clearly wrong and manifestly unjust or whether the verdict is against the great weight and preponderance of the conflicting evidence. *Watson,* 204 S.W.3d at 414-15; *Johnson,* 23 S.W.3d at 10-11.

1. Work Product.

TEX. PEN. CODE ANN. § 37.09 (Vernon 2003) prohibits tampering with or fabricating physical evidence, but the statute does not apply "if the record, document, or thing concealed is privileged or is the work product of the parties to the investigation or official proceeding." Section 37.09(b). Peter argues that the Whiteley affidavits were work product, that the statutory exception applies, and that the evidence was, therefore, legally insufficient.

Section 37.09 proscribes several different methods of tampering with or fabricating physical evidence, but the work-product exception by its terms only applies to records, documents, or things *concealed. See Cuadra v. State,* 715 S.W.2d 723, 724 (Tex. App.—Houston [14th Dist.] 1986, pet. ref'd)(the work-product exception applies only to concealed documents). Peter was indicted for conspiracy to *make, present, or use* false affidavits. The exception is inapplicable, and issue one is overruled.

2. Legal Impossibility.

Peter next argues that the evidence was legally or factually insufficient to establish his intent

to affect the Gallardo appeal[1] because the Whiteley affidavits could not have been considered by this court. The State responds that consideration of the Whiteley affidavits by this court was not legally impossible and that the language of Section 37.09 makes this immaterial because the State was not required to prove that the affidavits would or could have affected the outcome of the Gallardo appeal.

We agree with the State. Section 37.09 required the State to prove that Peter conspired to make, present, or use a document knowing that it was false and with the intent to affect the court or outcome of the Gallardo appeal. The statute is silent on any requirement that the State prove the attempt would have succeeded, and we have found no case recognizing or imputing such a requirement. Moreover, we believe such a requirement is inconsistent with the statute's plain intent. Our judicial system necessarily relies upon a baseline belief in the sanctity of the process. Any attempt to use fabricated evidence – regardless of the ultimate success of that attempt – is completely inconsistent with not only the administration of justice but with the integrity of the process. The statute recognizes this by outlawing a wide range of activities whose mere presence could undermine confidence in the

---

[1] Marcus Gallardo pleaded guilty to the offense of indecency with a child by exposure. He filed an application for writ of habeas corpus. The trial court denied that application, and he appealed to this court. We affirmed the trial court. *Gallardo v. State*, No. 11-04-00049-CR (Tex. App. -- Eastland, Sept 30, 2004, no pet.). All references to Gallardo's appeal are to Cause No. 11-04-00049-CR.

judicial system. It would make no sense to say that an attempt to make, present, or use fabricated evidence is any less culpable merely because the attempt was poorly conceived.

The State was not required to prove that this court could have considered the Whiteley affidavits or that those affidavits would have affected the outcome of the Gallardo appeal. The State was merely required to prove that Peter intended to affect the outcome of the Gallardo appeal. Peter's second and third issues are overruled.

3. Knowledge of the Affidavits' Falsity.

Peter next argues that the evidence was legally and factually insufficient to establish intent because he was not advised that the affidavits were untruthful until after they had been prepared. When all the evidence is viewed in light most favorable to the verdict, a rational trier of fact could have found the requisite intent beyond a reasonable doubt. *See Jackson*, 443 U.S. at 318-19. Peter knew that Gallardo was guilty of the underlying offense and, thus, knew that any affidavit asserting the crime did not take place was untruthful. However, Peter proceeded nonetheless. For this same reason, when the evidence is viewed in a neutral light, the evidence is not so weak that the verdict is clearly wrong and manifestly unjust, nor is the verdict against the great weight and preponderance of the conflicting evidence. *Watson*, 204 S.W.3d 414-15.

Peter and his son were representing Gallardo in his deportation proceedings. Their efforts appeared unsuccessful, and they met with Assistant

District Attorney Jason Cashon to discuss having Gallardo's criminal conviction set aside. Cashon advised them that this could only occur if there was a finding of actual innocence. Gallardo had been indicted for aggravated sexual assault and indecency with a child. Gallardo signed a stipulation of evidence and pleaded guilty to indecency with a child by exposure, and that judgment became final. Subsequently, the Immigration and Naturalization Service detained Gallardo, who was on probation, for deportation based on the conviction. Cashon later discussed with them a potential writ of habeas corpus. Because neither Peter nor his son were licensed to practice law in Texas state courts, Mikel Eggert asked Joe Lopez, a law school friend, to help. A petition for writ of habeas corpus was filed, but the trial court denied that petition and found that it was frivolous and groundless. On February 13, 2004, Gallardo appealed that denial to this court.

Peter met with Lee Roy Gaitan, a former chief of police of Dublin. He told Gaitan that he was representing some people in an immigration matter, he described the Gallardo litigation, and he asked Gaitan if he would be interested in helping Gallardo. Specifically, he asked Gaitan to sign a document that he could use with the Board of Pardons and Parole and to help get documents to Kim and M.W. Gallardo had been convicted of indecency with a child by exposure; the victim was Kim Whiteley's daughter, M.W. Peter told Gaitan that Gallardo had done wrong, that he was not disputing that, but that he was preparing something where Gallardo could possibly serve prison time to prevent the

deportation. Gaitan signed the statement without thoroughly reading it. When he subsequently did read the statement, he realized that it contained false information.

On March 22, 2004, Peter gave Gaitan a folder with papers and told him to have Kim sign the papers in front of a notary and then to give the papers back to him. Subsequently, Peter started calling Gaitan every day to check on his progress. Gaitan met with Kim on March 31, 2004. By then, Gaitan realized that the documents Peter wanted Kim to sign were false. He did not give the documents to her but threw them in the trash and told her that Peter was trying to contact her. Kim gave Gaitan permission to provide Peter with her phone number.

Peter called Kim and asked her to meet with him to discuss the Gallardo case. She agreed to do so and went to his office. He asked her if she remembered what had happened to her daughter. When she began to describe the incident, he became upset and told her that he did not want to hear what happened and that he just wanted to get the matter fixed. He gave her an affidavit for herself and her daughter and asked her to read them and have them signed and notarized. Peter gave her $20 for gas. He told her that, if she and her daughter signed the papers, he would give her anything she wanted and that, if she needed more money, it was available.

Kim read the affidavits. Neither was truthful. The following day, Kim told Peter that she did not feel that he was being truthful, that she did not want to talk to her daughter about it, and that she wanted

to drop the whole thing. She told Peter that she did not want him bothering her anymore. Peter told her that he would continue to call until she talked to her daughter.

On April 3, 2004, Peter called Kim again. He asked her to bring her daughter to Stephenville and told her that he really needed to talk to them and that he would continue to call her until she brought her daughter to meet him. That same day, Peter spoke with Gaitan and told him that he thought Kim was getting cold feet and that he wanted Gaitan to meet with her. After visiting with her attorney, Kim ultimately turned the documents over to the local Texas Ranger who investigated the matter.

This evidence is sufficient to support the jury's finding. There was evidence that Peter knew from the beginning that Gallardo was guilty but that his sole intent was to prevent the deportation by whatever means necessary. Peter acknowledged to Gaitan that Gallardo had done wrong, and when Kim began relating what had happened, he told her that he was not interested in the facts. However, the statement he provided to Gaitan and the affidavits he prepared for Kim and her daughter were fundamentally inconsistent with Gallardo's guilt. Moreover, there was evidence that, after Kim specifically told Peter that the affidavits were untruthful, he continued to pressure her.

The evidence also established that the affidavits were intended for use with this court. On April 5, 2004, Gallardo filed a motion to extend the time for filing his brief with this court. That motion included the following statement:

> Appellant's counsel has recently discovered new evidence which controverts the State's Original allegations. Appellant needs additional time to file his brief in order to document such new evidence.

The only evidence of "new evidence" is the proposed Whiteley affidavits. Furthermore, the motion indicates additional time was needed to "document" the new evidence. Peter was then actively involved in obtaining signatures on the Whiteley affidavits. There was no evidence of any other efforts to document new evidence. This evidence is legally and factually sufficient to support the jury's verdict. Issues four and five are overruled.

B. Charge Error.

Peter argues that the trial court erred by refusing to submit an instruction on the work-product defense or, alternatively, that his trial counsel was ineffective if this issue was not properly preserved. When analyzing a jury-charge issue, we must first decide whether error exists. *Middleton v. State,* 125 S.W.3d 450, 453 (Tex.. Crim. App. 2003). If so, we analyze that error for harm. The degree of harm necessary depends upon whether the error was preserved by objection. If the defendant properly objected to the charge, some harm requires reversal. *Almanza v. State,* 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). If the defendant did not object to the charge, reversal is not required unless the record shows egregious harm to the defendant. *Id.*

We have previously found that the work-product exception only applies when the State alleges that the defendant concealed a document,

record, or thing. Peter was not indicted for concealing evidence, but for conspiracy to fabricate evidence. The work-product exception, therefore, does not apply, and the trial court did not error when it refused to include Peter's requested instruction. This holding makes Peter's ineffective assistance claim moot. Issues six and sever are overruled.

C. Motion for New Trial.

Peter filed a motion for new trial that was based in part on newly discovered evidence. Peter testified at trial that he had tape-recorded his conversations with Gaitan but that they had been accidentally erased. Peter contended that, after the trial, he was able to recover part of the recordings and prepare a transcript. The trial court held a hearing and ordered Peter to produce all tape or digital recordings of his conversations with Gaitan as well as the digital recording device with memory card and the original analog tape used to create his transcript. Peter's motion was subsequently overruled without further hearing or evidence.

We review the grant or denial of a motion for new trial under an abuse of discretion standard. *See Lewis v. State,* 911 S.W.2d 1, 7 (Tex. Crim. App. 1995). We may not substitute our judgment for that of the trial court, *Cantu v. State,* 842 S.W.2d 667, 682 (Tex. Crim. App. 1992), and credibility of the witnesses is primarily a determination for the trial court. *Hoyos v. State,* 951 S.W.2d 503, 511 (Tex. App. – Houston [14th Dist.] 1997), *aff'd,* 982 S.W.2d 419 (Tex. Crim. App. 1998). As finder of fact, the trial court may accept or reject any or all of the testimony given by State or defense witnesses.

Johnson v. State, 571 S.W.2d 170, 173 (Tex. Crim. App. 1978); *see also Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). Thus, we are authorized (1) to apply a deferential standard of review to the trial court's resolution of historical facts and (2) rely upon implied findings of fact that are supported by the record to uphold the trial court's ruling, even when the trial court is not faced with expressly conflicting affidavits or testimony. *Charles v. State*, 146 S.W.3d 204, 206 (Tex, Crim. App. 2004); *Villarreal v. State*, 79 S.W.3d 806, 811-12 (Tex. App. – Corpus Christi 2002, pet. ref'd).

A new trial shall be granted an accused where material evidence favorable to the accused has been discovered since trial. TEX. CODE CRIM. PROC. ANN. at 40.001 (Vernon 2006). The party who moves for a new trial based on newly discovered evidence must satisfy a four-part test: (1) the newly discovered evidence was unknown or unavailable to the accused at the time of his trial; (2) the accused's failure to discover or obtain the evidence was not due to a lack of diligence; (3) the new evidence is admissible and is not merely cumulative, corroborative, collateral, or impeaching; and (4) the new evidence is probably true and will probably bring about a different result in another trial. *See Keeter v. State*, 74 S.W.3d 31, 36-37 (Tex. Crim. App. 2002).

The record does not establish an abuse of discretion. Peter knew about the recordings at the time of trial because he testified about them. Whether he exercised due diligence to recover those recordings before trial is inherently a fact issue.

Under our deferential standard of review, we cannot second-guess the trial court's implied finding that he did not do so. Furthermore, the only purpose of the new evidence was to impeach Gaitan's testimony about his conversations with Peter. Because impeachment evidence is not "new evidence" for purposes of a new trial, this also supports the trial court's decision. Issues eight and nine are overruled.

IV. Holding

The judgment of the trial court is affirmed.

PER CURIAM

June 7, 2007

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Wright, C.J.,
McCall, J., and Strange, J.

11TH COURT OF APPEALS
EASTLAND, TEXAS
JUDGMENT

Peter Hellmuth Eggert,	*From the 266th District Court of Erath County, Trial Court No. CR 12121.
Vs. No. 11-05-00234-CR	*June 7, 2007
State of Texas,	*Per Curiam Opinion (Panel consists of:

Wright, C.J., McCall, J.,
and Strange, J.)

This court has inspected the record in this cause and concludes that there is no error in the judgment below. Therefore, in accordance with this court's opinion, the judgment of the trial court is in all things affirmed.

APPENDIX "B"

TRIAL COURT JUDGMENT

App. 15

CAUSE NO. CR 12121

THE STATE OF TEXAS §

VS §

PETER HELLMUTH EGGERT §

IN THE DISTRICT COURT

266TH JUDICIAL DISTRICT

ERATH COUNTY, TEXAS

JUDGMENT ON VERDICT OF GUILTY BY JURY
PUNISHMENT FIXED BY COURT –
PROBATION GRANTED

JUDGE
PRESIDING: Honorable David Cleveland

DATE OF JUDGMENT: June 14, 2005

ATTORNEY FOR
THE STATE: Attorney Pro Tem Garry Lewellen

ATTORNEY FOR
THE DEFENDANT: Andrew Ottaway

OFFENSE CONVICTED OF: Criminal Conspiracy; Fabricating Physical Evidence
TEXAS PENAL CODE § 15.02; 37.09 (aX2)

DEGREE OF OFFENSE: State Jail Felony

DATE OFFENSE COMMITTED: April 5, 2004

CHARGING INSTRUMENT: Amended Indictment

PLEA: Not Guilty

VERDICT: Found Guilty, Court assessed Punishment at Two (2) years confinement in a State Jail Division of the Texas Dept. of Criminal Justice probated for Five (5) years, a fine of $5,000.00, and 30 days in jail

FOREMAN OF THE JURY: Katy Maxwell

PLEA TO ENHANCEMENT: Not Applicable

FINDING TO ENHANCEMENT: Not Applicable

FINDING ON USE OF A DEADLY WEAPON: None

DATE SENTENCE IMPOSED: June 14, 2005

COSTS: $313.00 Court; $4,000.00 Attorney Fee

PUNISHMENT AND PLACE OF CONFINEMENT: Two (2) years confinement in a State Jail Division of the Texas Dept. of Criminal Justice probated for Five (5) years, a fine of $5,000.00, and 30 days in jail

DATE TO COMMENCE: June 14, 2005

On the 13th day of June, 2005 this cause was called for trial, and the State appeared by the above-named attorney, and the Defendant appeared in person in Open Court and the above-named counsel for the Defendant also being present; and the said Defendant having been duly arraigned and it appearing to the Court that the Defendant was mentally competent, and having plead as shown above to the Indictment herein, the State announced ready; and thereupon a jury, to-wit: the above named Foreman and eleven others was duly selected, impaneled, and sworn, who having heard the Indictment read and the Defendant's plea thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer, the Defendant and Defendant's counsel being present, and on the 14th day of June 2005 returned into Open Court the verdict of GUILTY as set forth above, which was received by the Court and is here now entered upon the minutes of the Court as shown above. Whereupon, the Defendant waived his election to

have the Jury assessed punishment and the State consenting to the same the jury was discharged and the Court after considering any further evidence offered by the State or Defendant and upon the recommendation of the State the Court assessed punishment as set forth above, suspending imposition of sentence as to confinement only and placing Defendant on probation for a term of five (5) years.

IT IS THEREFORE ORDERED by the Court that the Defendant is adjudged to be guilty of the offense of Criminal Conspiracy; Fabricating Physical Evidence, and the Defendant committed the offense on the date set forth above as charged in the Instrument shown above, and the Defendant be punished as has been determined and be confined in the place of confinement as shown above, for the term of time shown above, and that the State of Texas do have and recover of the said Defendant all costs in this prosecution expended including any fine shown above for which let execution issue.

IT IS THEREFORE ORDERED, however, in light of the Jury's verdict on punishment that the imposition of sentence (as to commitment only) be, and it is hereby suspended and Defendant is hereby placed on probation for a term of Five (5) years, beginning on the date of entry of this Judgment, under the supervision of the Court through the Community Supervision and Corrections Department of this

County, subject to the following terms and conditions, namely: That during the term of this probation the Defendant SHALL:

1. Neither commit nor be convicted of any offense against the laws of the State of Texas, or any other State or of the United States of America.

2. Avoid injurious or vicious habits and abstain from the use of unlawful controlled substances in any form and not use alcoholic beverages. Do not use and/or possess any type and/or form of alcoholic beverage and/or unlawful controlled substance.

3. Avoid places and persons of harmful or disreputable character, including places where unlawful controlled substances are possessed, sold, or used and not associate with person who possess, sell, or use controlled substances, and not associate with persons with criminal records.

4. Obtain and keep gainful employment in a lawful occupation.

5. Report to the Probation Officer of Erath County, Texas, on or before the fifth day of each month during the term of probation.

6. Permit the Adult Probation Officer or his or her assistants to visit you at your home or elsewhere.

7. Remain within Erath County, Texas, unless permitted in writing to depart by the Court and/or Adult Probation Officer.

8. Not leave the State of Texas, without the written consent of the Court filed among the papers in this case.

9. Support your dependents that you now have or that you may acquire during the term of this probation.

10. Report any change of address, change of job or arrest to the Adult Probation Officer immediately.

11. Pay court costs in the sum of $313.00 to and through the Community Supervision and Corrections Department of Erath County, Texas, on or before the 14th day of August, 2005.

12. Pay to and through the Community Supervision and Corrections Department of Erath County, Texas, the sum of $200.00 each month, beginning on the 1st day of August, 2005, and continuing thereafter on the same day of each successive and consecutive month until all applicable sums set forth in the following subparagraphs 'a' through 'c', inclusive, have been fully and finally paid, to-wit:

a. Attorney fees in the sum of $4,000.00
b. Restitution in the sum of $0.00

c. Fine in the sum of $5,000.00

(all such payments are to be applied by the Community Supervision and Corrections Department of Erath County, Texas, to the payment of the above items. If applicable, in the order of listing).

13. Pay to and through the Community Supervision and Corrections Department of Erath County, Texas, probation fees in the sum of $50.00 each month, beginning on the 5th day of August, 2005, and continuing on the same day of each and every month thereafter during the term of probation.

14. Submit to blood, urine and/or breath testing at any time and from time to time as directed by the Adult Probation Officer at his or her discretion during the term of probation. The Probationer shall pay for all costs of such testing.

15. Participate in any and all community based educational programs and testing as directed by the Community Supervision and Corrections Department.

16. Work faithfully and satisfactorily participate in a community service project by completing 150 hours of community service, at a rate of no less than 16 hours per calendar month, by performing said community service in accordance with *Texas*

Criminal Procedure Code Article 42.12 __16. Said community service is to be in accordance with general administrative and reporting guidelines set forth by the Erath County Supervision and Corrections Department.

17. Pay a fee of $25.00 on or before 60 days from the date of this Order to the Community Supervision and Corrections Department of Erath County, Texas, for use by the Erath County Crimestoppers, Inc.

18. The Defendant shall not engage in the practice of law in any judicial proceeding in this State during the term of probation.

19. The Defendant shall not give any legal advice or engage in the practice of law during the term of probation.

20. As a condition of probation the Defendant will be confined to the Erath County Jail for a term of 30 days beginning on the date of entry of this order and without credit for time previously served pursuant to Section 12(a) of Article 42.12 of the *Texas Code of Criminal Procedure*.

SIGNED AND ORDERED:

/s/ (David Cleveland)
Judge Presiding

I, PETER HELLMUTH EGGERT, Defendant, in the above cause hereby acknowledge that I understand the conditions of my probation, and further understand that the Court may at any time, during the period of probation, alter or modify these conditions; and that the Court has authority to revoke my probation for violation of any of the above conditions; further, that a copy of the above Order setting out the terms and conditions of my probation was delivered to me on June 14, 2005.

ATTEST:

/s/ (Wanda Pringle)
District Clerk of
Erath County, Texas

/s/ (Peter H. Eggert)
PETER H. EGGERT

By:_____

I, PETER HELLMUTH EGGERT, do hereby certify that I am one and the same person convicted of the offense Criminal Conspiracy; Fabricating Physical Evidence on the 14th day of June, 2005 in Cause No. CR 12121 in the 266th Judicial District Court of Erath County, Texas. I further certify that the Inked fingerprint impression which appears in the box below was made by my right thumb or other finger listed _____.

RIGHT THUMB OR OTHER
FINGER LISTED

/s/ (Peter H. Eggert)
PETER H. EGGERT

I, Wanda Pringle, District Clerk for the 266th Judicial District Court of Erath County, Texas, do attest that the above Defendant, PETER HELLMUTH EGGERT, was convicted in the 266th Judicial District Court of Erath County, Texas, on the 14th day of June, 2005, in Cause No. CR 12121 for the offense of Criminal Conspiracy; Fabricating Physical Evidence. Furthermore, the above Inked fingerprint impression was made by the same PETER HELLMUTH EGGERT, who was convicted in this cause.

/s/ (Wanda Pringle)
District Clerk
266th Judicial District
Erath County, Texas

by: _____
Deputy

Filed for record
____ o'clock ___m

June 14 2005

Wanda Pringle
District Court of Erath County, Texas

APPENDIX "C"

DENIAL OF REHEARING BY 11TH COURT OF APPEALS

App. 25

SEAL
State of Texas

Court of Appeals
Eleventh District of Texas
100 West Main Street
P.O. Box 271
Eastland, Texas 76448

JIM R. WRIGHT
Chief Justice
TERRY MCCALL
Justice
RICK STRANGE
Justice

SHERRY WILLIAMSON
Clerk
Tele: 254/629-2638
Fax: 254/629-2191

July 19, 2007

Peter H. Eggert
1739 S.W. Loop 410
Suite 804-B
San Antonio, TX 78227

Walter M. Reaves Jr.
Attorney at Law
P.O. Box 55
West, TX 76691

Garry Lewellen
McMillan & Lewellen
Attorneys at Law
P.O. Box 652
Stephenville, TX 76401

RE: Appellate Case Number: 11-05-00234-CR
Trial Court Case Number: CR 12121

Style: Peter Hellmuth Eggert
v.
The State of Texas

The Court has this day OVERRULED Appellant's motion for rehearing in the above cause.

If either party wishes to file a Petition for Discretionary Review, please note that pursuant to TEX.R.APP.P.202(7), a copy of our Court's opinion must be attached to each copy of the Petition for Discretionary Review.

Respectfully yours,

Sherry Williamson, Clerk

By: Johanna Blair, Deputy

cc: David Cleveland, Judge

APPENDIX "D"

REFUSAL OF PETITION FOR DISCRETIONARY REVIEW
BY TEXAS COURT OF CRIMINAL APPEALS

App. 27

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O.BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

United States Postage
Postal Stamp
Dated: Feb. 14, 2008

Wednesday, February 13, 2008
Re: Case No. PD-1328-07
COA#: 11-05-00234-CR
STYLE: EGGERT, PETER HELLMUTH

On this day, the Appellant's petition for discretionary review has been refused.

Louise Pearson, Clerk

PETER HELLMUTH EGGERT
1739 S W LOOP 410
SUITE 804 B
SAN ANTONIO TX 78227

AYN31 78227

APPENDIX "E"

DENIAL OF REHEARING
BY TEXAS COURT OF CRIMINAL APPEALS

App. 28

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O.BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

United States Postage
Postal Stamp
Dated: Apr 03, 2008

4/2/2008
COA#: 11-05-00234-CR TC#: CR 12121
Re: Case No. PD-1328-07

STYLE: EGGERT, PETER HELLMUTH

On this day, the Appellant's Pro Se motion for rehearing has been denied.

Louise Pearson, Clerk

PETER HELLMUTH EGGERT
1739 S W LOOP 410
SUITE 804 B
SAN ANTONIO TX 78227

AYN31 78227

APPENDIX "F"

APPELLANT'S SUPPLEMENTAL MOTION FOR REHEARING
WITH NEWLY DISCOVERED EVIDENCE
TO 11TH COURT OF APPEALS

App. 29

NO. 11-05-00234-CR

IN THE COURT OF APPEALS
FOR THE ELEVENTH DISTRICT OF TEXAS
EASTLAND, TEXAS

PETER H. EGGERT,

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

On Appeal from the 266th District Court
Of Erath County, Texas

APPELLANT'S SUPPLEMENTAL
MOTION FOR REHEARING

Peter H. Eggert
Attorney at Law*
TxSBN: 24051659 Intl.

739 S.W. Loop 410, Suite 804-B
San Antonio, Texas 78227
Phone: (210) 670-1616
Fax: (210) 670-9040
*Foreign Jurisdiction –
Not licensed before Texas Courts
APPELLANT, PRO SE

July 5, 2007

INDEX OF AUTHORITIES

Cooks v. State,
844 S.W.2d 697 (Tex.Cr.App. 1992) *4*

Texas Code of Criminal Procedure, Article 35.11 .....*4*

Texas Code of Criminal Procedure, Article 35.20.....*4*

Texas Rules of Appellate Procedure, 10.5(b)(1) *3*

Texas Rules of Appellate Procedure, 49.8 ..... *3*

APPELLANT'S SUPPLEMENTAL MOTION FOR REHEARING

TO THE HONORABLE COURT OF APPEALS:

Appellant, PETER H. EGGERT, appearing before this Court on his own behalf, and pursuant to Rules 10.5(b)(1) and 49.8 of the Texas Rules of Appellate Procedure, files this his *Appellant's Supplemental Motion for Rehearing* to *Appellant's Motion for Rehearing* which was timely filed on June 21, 2007, and respectfully requests that the Court consider the following:

APPELLANT'S REASON FOR FILING SUPPLEMENTAL MOTION

Since timely filing *Appellant's Motion for Rehearing*, Appellant has become aware that the seating of the jury panel in Appellant's trial on June 13 and 14, 2005 was not in compliance with Article 35.20 of the Texas Code of Criminal Procedures because the panel was not seated and/or called in the order in which they appear upon the list furnished the Appellant/Defendant (attached hereto as Appendix, Tab 5).

Appellant has now obtained a copy of the official Original List of Petit Jurors for the week beginning the 13th day of June, 2005, which, when compared to the actual seating, plainly shows that the panel was not called and/or seated according to such list.

For instance, the ultimately elected foreperson of the jury, Ms. Katy Maxwell[1], was seated as number 7 (front row); however, according to the jury list she was number 87, which would have rendered her unlikely to be reached. Or, Mr. Orlando Gaitan, a cousin of the State's prime witness, was seated as number 12 (second row) with number 102 on the jury list.

Of all the persons seated in the first three rows (1 to 21) of the panel, only three were designated as such in the jury list, and none in the first row. (Appellant attaches a comparison list of actual seating versus jury list as Appendix, Tab 6).

The ambiguous seating of the panel caused severe and irreparable harm to Appellant because Appellant's counsel had to use his strikes on persons who, if seated in accordance with the law, would not have been reached.

ARGUMENT

Article 35.11, Tex. Code Crim. Proc., states:

> "... The clerk shall randomly select the jurors by a computer or other process of random selection and shall write or print the names, in the order selected, on the jury list from which the jury is to be selected to try the case. The clerk shall deliver a copy of the list to the State's counsel and to the defendant or his attorney."

---

[1] Katy Joanna Maxwell has admitted that she is the daughter of a member of the Grand Jury.

Article 35.20, Tex. Code Crim. Proc., provides:

> "In selecting the jury from the persons summoned, the names of such persons **shall be called in the order in which they appear upon the list** furnished the defendant. ..." (emphasis added)

In the case at bar, the trial court clerk adhered to the provisions of Art. 35.11 and created and delivered the required list. However, the trial court clerk did not pay any attention to the provisions of Art. 35.20.[2]

In *Cooks v. State*[3] the Texas Court of Criminal Appeals held that:

> "Where the trial court errs in some aspect of selecting and empaneling a venire, a defendant can only obtain a reversal by showing some type of harm."

Here, the harm is incredibly obvious because the constitutionally guaranteed impartiality of Appellant's *randomly selected* jury can never be ascertained. Moreover, the non-compliance by the trial court clerk could lead to the inference that the panel's seating of persons most favorable to the State's *guilty verdict* was deliberate, which could explain the *Special Prosecutor's* decision to shorten

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[2] Appellant noticed that there is a possible difference between civil and criminal jury trial provisions.

[3] *Cooks v. State*, 844 S.W.2d 697 (Tex.Cr.App. 1992).

the trial after *voir dire* and present only three of the ten noticed witnesses [CR at 23 to 25].

Additionally, the reaction to the seating of the panel gives further rise to Appellant's issue no. 4 in *Appellant's Motion for Rehearing*, whereby Appellant addresses the ineffective assistance of Appellant's appointed counsel during trial.

PRAYER FOR RELIEF

Appellant respectfully prays that, in the interest of justice, this Appellant's Supplemental Motion for Rehearing be filed along with the original motion filed on June 21, 2007, and for such other relief to which he may be entitled.

Respectfully submitted
s/s (Peter H. Eggert)

Peter H. Eggert
Attorney at Law *
TxSBN: 24051659 Intl.
1739 S.W. Loop 410, Suite 804-B
San Antonio, Texas 78227
Phone: (210) 670-1616
Fax: (210) 670-9040
*Foreign Jurisdiction –
Not licensed before Texas Courts

APPELLANT, *PRO SE*

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing instrument was served on the following party and/or counsel via Certified Mail, Return Receipt Requested, on July ____, 2007:

Garry Lewellen, Esq.
Special Prosecutor
157 South Graham
Stephenville, Texas 76401

s/s (Peter H. Eggert)

Peter H. Eggert

APPENDIX "G"

OFFICIAL TRIAL COURT JURY LIST

App. 36

THE STATE OF TEXAS
COUNTY OF ERATH

I DO HEREBY CERTIFY THAT THE FOREGOING LIST OF PETIT JURORS IS A TRUE AND CORRECT COPY OF THE ORIGINAL LIST OF PETIT JURORS FOR THE 266TH DISTRICT OF
ERATH COUNTY, TEXAS, FOR THE WEEK BEGINNING THE 13TH DAY OF JUNE , 2005 AND I HEREBY NOTE THAT SAID JURORS ARE TO APPEAR AT THE COURTHOUSE OF SAID COUNTY IN , TEXAS AT 08:30 A.M. ON SAID DATE BEFORE THE HONORABLE DONALD R. JONES JUDGE OF THE 266TH DISTRICT.

IN TESTIMONY WHEREOF, WITNESS MY HAND AND SEAL OF SAID COURT THIS 27 DAY OF May, 2005.

BY s/s (W. Pringle)

DEPUTY

SHERIFFS RETURN

CAME TO HAND ON THE _____ DAY OF _____, AT _____ O CLOCK ____ M. AND EXECUTED BY NOTIFYING EACH OF THE PERSONS NAMED THEREIN TO BE IN ATTENDANCE IN THE 266TH DISTRICT OF ERATH COUNTY, TEXAS, ON THE 13TH DAY OF JUNE , 2005, AT 08:30 O CLOCK A.M., TO SERVE AS PETIT JURORS.

RETURNED THIS THE _____ DAY OF _____, _____.

_____ SHERIFF

BY _____ DEPUTY, ERATH COUNTY, TEXAS.

(handwritten)
For June 13th, 2005

(stamp)
FILED FOR RECORD
AT ____ O'CLOCK ____ M

MAY 27 2005

Wanda Pringle
CLERK DISTRICT COURT ERATH COUNTY, TEX

Note: For the purpose of this Petition, the Date-of-Birth, Precinct, Address, and Zip-Code has been omitted.

LIST OF PETIT JURORS

(NUMERICAL) 5/27/2005

ORIGINAL LIST

LIST NO. 231 OF THE PETIT JURORS TO REPORT ON 13TH DAY OF JUNE 2005, FOR THE 266TH DISTRICT OF ERATH, TEXAS

NO.	NAME	CLERK'S NOTES
1	TODD FENN	Deferred from 03/21/2005
2	LINDA SUE TATE	Deferred from 03/21/2005
3	FREDDY MACK MIDDLETON	Deferred from 05/02/2005
4	MIRANDA TY HOGAN	
5	LILLIAN COX BROADUS	returned
6	HEATHER LEANN RIPLEY	
7	LINDA J POSEY GILES	
8	COLLEEN LINN SEXTON	
9	JOEL BRIT JOHNSTON	
10	DEIDRE SUSAN STRONS WALKER	
11	BETTE J STEWART	
12	VERNA BUSBY SMITHEY JAGGARS	
13	KAMI DIANE WYCUFF	
14	VICKIE L MCNEILL	
15	LARRY DENNIS BLANKENSHIP	
16	ETHAN MICHAEL KINSEY	
17	ERICA CHRISTINA VILLICANA GOMEZ	

18	GLADYS MABEL TOWERS	
19	CHRISTOPHER ANDREW SMITH	
20	MONTY KEITH JONES	
21	TREY LAURENT CASAUBON	
22	MARVIN LEROY BELL	
23	CHRISTINE ANN MALINOWSKI	college
24	TOSKA MARIE SIMS	
25	CHRYSTAL MICHELLE CROSS	child
26	RUBY LEE SHUBERT	
27	TOMMY RAY DINGMAN	
28	FRANK DR TERRELL	
29	GREGORY HOWARD THOMPSON	
30	KIMBERLY LYNN PETERSO WILLIAMS	
31	GAYNELL BUTLER	
32	STEVEN KAYNE BARKER	
33	MICHAEL SEAN HARDIN	
34	JIMMY DALE BELL	
35	WILLIAM TRAVIS KIRK	returned
36	DEANNA BARBARA STOKER	will re-schedule
37	ROBIN DWAIN PEACOCK	
38	STEPHANIE MARCKE BELCHER	
39	ERNEST BART MCDOUGAL	
40	JAMES VERNON WALTON	
41	NICHOLAS LOUIS PERNOKAS	
42	THOMAS FRANCIS KENNEDY	
43	JOE L. CROW	
44	AMANDA PATE CONNAN	returned
45	CARL JOSEF PHILLIPS	
46	ANITA LOUISE WATSON PERRY	
47	SHAWN ERIC MONTGOMERY	
48	STACEY DANIELLE PORTER HUFFMAN	
49	JIMMY RAY HORNBECK	
50	VEDA F LINDSEY	

51	GREGORY RAY SULT	
52	SHELLY ANN HUDGPETH	returned
53	ROBERT DWAYNE PACK	
54	MATTHEW JUDSON BAILEY	
55	BRANDY LYNETTE WILSON BARNES	child
56	JOSHUA JARED SALTER	returned
57	CAROL JEAN RAMSEY REED	
58	RAMONA LUNA	
59	LARRY DON MURPHY	
60	CHRISTOPHER DEE WALKER	
61	JUSTIN WADE CHAPMAN	
62	ROLLY WAYNE HARRISON	
63	ROBERT CODY DERRICK	
64	DONALD LOUIS DURHAM	
65	MARY FRANCES HICKS PARKER	
66	LAWRENCE RAY WAND	
67	SALLY ANN STORK	
68	TIFFANY RENEE LANDIS	
69	DONALD KEATH KALE	
70	SEIBERT DAVID WALKER	
71	LLOYD BENNETT HARRIS	deceased
72	MARY LOZANO KENNEDY	
73	PAMELA BRANHILL SAWYER	
74	SAMUEL C. JEFFCOAT	
75	MARY GAYLE HANEY	
76	BILLY JOE DUNCAN	
77	FLOYD WILEY STOKES	
78	JENNIFER JUANELL HARDGRAVE	
79	LAURIE ANN SALES LITTLE	
80	CHARLES LEE BERRY	
81	HARVEY BLAND HARPER	
82	DON MICHAEL SIMS	
83	TERRY LYNN PACE	

84	DANIEL RAY NELSON	
85	ARTHUR PACK	
86	DONALD EDWIN UNDERWOOD	
87	KATY JOANNA MAXWELL	
88	JENNIFER MARIE DOWELL	
89	JUDY CRAWFORD ROBERTS	
90	BOB GENE CADENHEAD	
91	TONY CLAY BUTLER	
92	CLARA ELENA MANRRIQUEZ	
93	DENNIS GERARD JONES	
94	BILL GENE HAYES	returned
95	SUSAN LYN REEDY MURRAY	
96	DAWN MARIE RITCHEY	
97	MICHAEL EDWARD NUXEN	
98	TAMERIA MARIE STANART	
99	MARSHA FRENCH KARNES	
100	JERRY LEE THOMAS QUALLS	grand-child
101	PAUL JOSE LOLLAR	
102	ORLANDO O GAITAN	
103	DON S BURGAN	
104	JANET LEIGH JOHNSON HOWLE	
105	HUGHBERT ARNOLD COLLIER	
106	BRADLEY ALLEN BLACK	
107	TONY LEE CLEMENT	
108	CHARLES A ROBERSON	
109	GEORGE RICHARD SIEVERS	
110	JAMES LAVERN MARTIN	
111	ANNA LOUISA LOPEZ	returned
112	JIMMY J MCCOY	
113	ANDREJA SAFAR GIVENS	
114	TAMMY J MCALLISTER WEAVER	
115	JUANITA GENOVEVA ROMERO JUAREZ	
116	MICAHEL DAVID HENNEKE	

117	PATRICA ANNETTE LITTLE	
118	BRADLEY JOEL DAYEUR	returned
119	LARRY DENZEL LEE	
120	LANETTE CHANDLER	
121	KEVIN SCOTT FORRESTER	
122	FRANK DERRICK SKIDMORE	
123	CLARENCE DAVID LOWERK	
124	CARLOS JAVIER JARNIELLO	returned
125	LINDA VERNELLE MALONE	
126	JERRY LOU BAILEY	
127	HEATH EUGENE ALLEN	
128	RANDAL DALE ELSTON	
129	WALKER LIBB WALLACE	
130	CAROLYN RUTH GREEN	excused
131	KANDAS MARIE MCLAIN	returned
132	CHRISTINA MARIE NOEL	college
133	SHUAN LEE BICKLEY	
134	DEANNA JEAN SIKES JOHNSON	
135	CLIFF EDWARD BRAMLETT	
136	EDITH ELIZABETH QUIRL	
137	CHARLOTTE DENISE GARCIA	
138	JAMMIE PRESTON FAIR	
139	JOSE ANTONIO SOTO	returned
140	THOMAS RAY GREEN	
141	JOSPEHINE E MARTINEZ	returned
142	JAMES LEORY BANKS	
143	KALUA A PEDERSON STEWART	
144	ADAM SANCHEZ	
145	NICHOLAS ROY DONEGAN	
146	RICHARD THURSTON HOUSE	
147	SANDRA LYNN OBRYAN	
148	LISA SUE NEWTON	
149	W A MORRIS	

150	KENNETH LEE DITMORE	
151	BOBBY CHANCE MCLEROY	
152	JUDY LORRAINE MANLEY CARTER	
153	JERRY DON SLAWSON	
154	JOSHUA ALAN HOUSTON	
155	THERESA ANN HODGE	
156	VICTORIA ARLINE TAYLOR	
157	PETER ANTHONY VANDALEN	
158	LAQUITA KAY JOHNSON	
159	AUBRY JOE KENNEDY	
160	FELICITY CROSSFIELD HARVEY	
161	SHELTON WADE WATSON	
162	ANTHONY CHAD SEIDEL	college
163	TANIA CELESTE CHILDERS WILSON	
164	DANUTA K ALECHMOWICZ	can not read/write
165	VCIBRO GEROMINO REYES	moved
166	TERESA ANN HOLCOMB	
167	MARY LOU GREEN JOWERS	
168	STEPHANIE D'ANN RODGERS	
169	MICA BROOKE MCNUTT	
170	DARYLE DON WEAVER	
171	JASON KIEL QUALLY	
172	KEITH WILSON BAILEY	
173	SERGIO VASQUEZ RUIZ	
174	MICHELE LYNNE GARNER	
175	BILLY CARRY BLACKWELL	

APPENDIX "H"

ACTUAL SEATING OF TRIAL COURT JURY

App. 44

Note: **First Numbers are actual seating; Numbers in ( ) are on Jury List.**

42 JONES (20)
41 DOWELL (88)
40 BELL (22) -- or (34)
39 SHUBERT (26)
38 WALKER (10)
37 MORRIS (149)
36 WYCUFF (13)

35 HARPER (81)
34 JOWERS (167)
33 GOMEZ (17)
32 QUIRL (136)
31 PACK (85)
30 LANDIS (68)
29 HARDIN (33)

28 DURHAM (64)
27 NELSON (84)
26 PEACOCK (37)
25 LITTLE (79)
24 WAND (66)
23 MURPHY (59)
22 HARRISON (62)

21 HOUSTON (154)
20 JAGGERS (12)
19 BAILEY (54)

18 BLACKWELL (175)
17 McDOUGALL (39)
16 MURRAY (95)
15 BLANKENSHIP (15)

14 MARTIN (110)
13 TERRELL (28)
12 GAITAN (102)
11 SIMS (24)
10 STEWART (11)
9 BERRY (80)
8 WEAVER (114)

7 MAXWELL (87)
6 RODGERS (168)
5 BELL (22) -- or (34)
4 DERRICK (63)
3 PACK (53)
2 DUNCAN (76)
1 HANEY (75)

Seated Jury for Trial on June 13 & 14, 2005

2 DUNCAN (76)
3 PACK (53)
7 MAXWELL (87)
14 MARTIN (110)
15 BLANKENSHIP (15)
16 MURRAY (95)
20 JAGGERS (12)
27 NELSON (84)

28 DURHAM (64)
30 LANDIS (68)
34 JOWERS (167)
37 MORRIS (149)

SUPREME COURT, U.S.
FILED
OCT 27 2008
OFFICE OF THE CLERK

No. 08-27

In The
Supreme Court of the United States

PETER HELLMUTH EGGERT,
Petitioner,
vs.

STATE OF TEXAS
Respondent.

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

Respondent objects to the Petitioners' Questions Presented on the ground that they assume certain jurisdictional, procedural, legal, and factual premises that are demonstrably unfounded, as established more fully in this brief.

Respondent suggests instead the following Questions Presented:

1. Does the Court have jurisdiction under 28 U.S.C. § 1257(a) to review the Texas Eleventh Court of Appeals' decision below, denying Petitioner Eggert's supplemental motion for rehearing, in which Eggert first raised the claims presented here?

2. Should the Court grant a petition for a writ of certiorari where Petitioner failed to follow the appropriate state appellate rules to obtain review of his federal claims?

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Petitioner Peter Hellmuth Eggert[1] filed a petition for writ of certiorari, seeking review of non-existent state-court determinations. As will be established in detail below, no Texas court has ever passed upon the federal claims Eggert now raises in this petition. Eggert first raised the factual bases of his claims—founded upon "newly discovered evidence"—in his supplemental, pro se, motion for rehearing in the Eleventh Court of Appeals of Texas. Appellant's Supplemental Motion for Rehearing, *Eggert v. State*, No. 11-05-00234-CR (Tex. App.–Eastland, Jul. 9, 2007); Pet. Cert. App. F.[2] Because Texas appellate procedure does not permit new evidence to be presented in such a manner, and the state court of appeals denied his motion for rehearing; it refused to consider the merits of these federal claims. Despite the fact that the Eleventh Court of Appeals[3] could not consider these claims, Eggert again reasserted the new-evidence claims in a petition for discretionary review filed in the Texas Court of Criminal Appeals. That court also refused to consider his new federal claims.

Respectfully, if the Court granted certiorari review in this case, such a decision would change the Court's role in reviewing federal constitutional claims presented on direct appeal, where no state court has ever reviewed those claims. Such a change would require the Court to act as a fact-finder.

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[1] Respondent State of Texas will be referred to as "the State."

[2] Unless otherwise noted, all references to "Pet. Cert." and "Pet. Cert. App." are to the petition and appendix filed in No. 08-27.

[3] The State will refer to the Eleventh Court of Appeals of Texas as the "court of appeals."

JURISDICTION

The Court lacks jurisdiction under 28 U.S.C. § 1257(a) to consider any of Eggert's claims on certiorari review because Eggert first raised both the legal and factual basis of the present claims, in his supplemental motion for rehearing filed with the court of appeals. The court of appeals simply denied Eggert's motion for rehearing. Likewise, Eggert's petition for discretionary review was refused. There has never been a final state court judgment or decree for any party with respect to Eggert's current claims. The decisions below thus do not draw into question any matter of federal law relevant to Eggert's petition. Accordingly, the Court lacks jurisdiction under § 1257(a) to review the purely procedural state court determinations not to consider Eggert's federal claims, given Texas appellate procedure.

STATEMENT OF THE CASE

I. Facts of the Crime

The evidence supporting the underlying conviction was succinctly summarized in a prior opinion:

> Peter Eggert and his son Mikel Peter Eggert were indicted for conspiracy to fabricate physical evidence by making, presenting, or using the purported affidavits of Kim Whiteley or M.W. with the knowledge that they were false and with the intent to affect an appeal pending in [the Texas Eleventh Court of Appeals]. The indictments were consolidated, and Peter and Mikel were tried together. The jury

> found both guilty, and the trial court assessed punishment at two years confinement and a $5,000 fine. The trial court probated the term of confinement for five years but not the fine.

Eggert v. State, No. 11-05-00234-CR, 2007 WL 1644580 (Tex. App.–Eastland 2007, pet. ref'd.).[4]

More specifically, Eggert engaged in the legal representation of Marcos Gallardo—in an unrelated case—in an effort to block Gallardo's deportation from the United States. 6 RR 227, 239–48.[5] To block Gallardo's deportation, Eggert attempted to have Gallardo's unrelated state criminal conviction set aside. 6 RR 33–35. Eggert was not licensed to practice law in Texas courts, nor apparently in any federal court. 6 RR 226.

The conviction which Eggert now challenges stems from his attempt to convince the complainant in Gallardo's unrelated criminal case to execute an affidavit that Eggert knew to be materially false, with the intention of submitting that materially false affidavit to the Eleventh Court of Appeals of Texas.

Hence, Eggert was convicted of conspiracy to fabricate physical evidence by making, presenting, or

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[4] The State will refer to this opinion as "*Eggert v. State*, slip op., at [page number]."

[5] "RR" refers to the reporter's record of the proceedings at trial for cause number 12119. There are nine volumes to the reporter's record. The Director will use the following citation format as appropriate: "[volume number] RR [page]."

using a false affidavit, with specific knowledge that it was false, and with the intent to affect an appeal pending in a state appellate court.

II. Direct Appeal

After his judgment of conviction, Eggert filed an appeal—through appellate counsel—with the court of appeals. Eggert raised four issues in his direct appeal: (1) legal and factual sufficiency of the evidence; (2) jury-charge error; (3) ineffective assistance of trial counsel; and (4) the trial court's decision to deny Eggert's motion for new trial. *Eggert v. State*, slip op., at *1. On June 7, 2007, the court of appeals affirmed Eggert's judgment of conviction. *Id.* at *6. Importantly, because Eggert's brief on direct appeal did not include the factual or legal basis of the claims presently before this Court, the court of appeals did not consider those claims. *Id.* at *1.

On June 21, 2007, Eggert filed a pro se, motion for rehearing with the court of appeals. Appellant's Motion for Rehearing, *Eggert v. State*, No. 11-05-00234-CR (Tex. App.–Eastland, Jun. 21, 2007). On July 9, 2007, Eggert filed a supplemental pro se, motion for rehearing with the court of appeals. Appellant's Supplemental Motion for Rehearing, *Eggert v. State*, No. 11-05-00234-CR (Tex. App.–Eastland, Jul. 9, 2007); Pet. Cert. App. F.

Eggert's supplemental motion for rehearing is the very first time he referenced certain newly discovered evidence, which he attached to his motion. The court of appeals denied Eggert's supplemental motion for rehearing on or about July 19, 2007, without addressing the new-evidence claims. Pet. Cert. App. C.

Eggert filed a petition for discretionary review with the Texas Court of Criminal Appeals, which that court eventually refused on or about April 3, 2008. Pet. Cert. App. E.

REASONS FOR DENYING THE WRIT

I. The Court Lacks Jurisdiction to Review Eggert's Claims.

As stated above, the Court lacks jurisdiction under 28 U.S.C. § 1257(a) to consider Eggert's petition because there is no existing "judgment"—final or otherwise—in relation to Eggert's claims. While this Court generally has jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . ." *see* 28 U.S.C. § 1257(a), no final judgment exists—at least with respect to the present federal claims—upon which to base such jurisdiction.

Specifically, § 1257(a) establishes a "firm final judgment rule." *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 81 (1997). As the Court explained, to constitute a final, reviewable judgment for purposes of § 1257, the state court's decision must be "final as an effective determination of the litigation and not merely of interlocutory or intermediate steps therein." *Id.* "It must be the final word of the final court," final and binding on the state court proceedings. *Id.* The requirement of finality in § 1257 "'is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.'" *Id.* (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)).

Finally, to assist in its determination of whether a reviewable "final judgment" has actually been rendered, the Court will examine "both the judgment and the opinion as well as other circumstances which may be pertinent." *Gospel Army v. City of Los Angeles*, 331 U.S. 543, 548 (1947).

Application of the Court's precedent makes clear that no court has ever entered a final judgment or decree in reference to Eggert's present claims. Nor has any court ever considered or passed on the factual or legal bases thereto. The court of appeals simply denied Eggert's supplemental motion for rehearing; the motion in which Eggert first attached the present "new evidence" claims. Pet. Cert. App. C. Likewise, the Texas Court of Criminal Appeals simply refused Eggert's petition for discretionary review, a refusal to review the legal determinations actually made by the court of appeals. *See Sotelo v. State*, 913 S.W.2d 507, 509 (Tex. Crim. App. 1995) ("This Court reviews only 'decisions' of the courts of appeals; we do not reach the merits of any party's contention when it has not been addressed by the lower appellate court."); Pet. Cert. App. E. No court has adjudicated the rights Eggert now claims were violated. Since there were no decisions below related to Eggert's present federal claims, this Court does not have jurisdiction to consider those allegations on certiorari review. 28 U.S.C. § 1257(a); *Jefferson*, 522 U.S. at 81.

To the extent, if any, Eggert may contend that either the court of appeals' denial of his supplemental motion for rehearing, or the Court of Criminal Appeals' refusal to consider his petition for discretionary review, constituted an adjudication of his claims, as established below, Eggert is simply incorrect.

The new evidence Eggert first submitted to the court of appeals purports to be a certified copy of the "Original List of Petit Jurors for the 266th District," for his trial. *See* Appellant's Supplemental Motion for Rehearing, *Eggert v. State*, No. 11-05-00234-CR (Tex. App.–Eastland, Jul. 9, 2007); Pet. Cert. App. at F. However, the Texas appellate courts have no discretion to consider factual allegations that are outside of the record on appeal:

> An appellate court may not consider factual assertions that are outside the record, and a party cannot circumvent this prohibition by submitting an affidavit for the first time on appeal. While the record may be supplemented under the appellate rules if something has been omitted, the supplementation rules cannot be used to create new evidence.

Whitehead v. State, 130 S.W.3d 866, 872 (Tex. Crim. App. 2004). The Texas appellate courts could not consider the factual basis of Eggert's claims. *Id.* Without the capacity to consider the petit jury list, the Texas courts could not have passed on Eggert's federal claims.

Thus, the pertinent circumstances make evident that *no* resolution of Eggert's present federal claims—much less a *final* resolution—was ever had in the State courts. Hence, Eggert's petition for the writ of certiorari should be denied because the Court has no jurisdiction pursuant to 28 U.S.C. § 1257(a).

II. In The Alternative, This Court Will Not Address Federal Claims Not Properly Raised in the State Courts.

A. Eggert failed to raise his federal claims in a procedurally proper manner.

"With very rare exceptions," the Court "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997). Indeed, where the state courts have not "expressly" addressed a federal question, a petitioner must affirmatively show that the federal question was actually addressed. *Id.* And where, "the highest state court is *silent* on a federal question before us, we assume that the issue was not properly presented." *Id.* (emphasis added).

Finally, and more specifically, raising a federal claim for the first time in a motion for rehearing is generally insufficient to properly raise that claim. *See Hanson v. Denckla*, 357 U.S. 235, 243–44 (1958); *see also Radio Station WOW, Inc.*, 326 U.S. at 120, 128 ("Questions first presented to the highest State court on a petition for rehearing come too late for consideration here . . . .").

Eggert fails to properly invoke the jurisdiction of the Court: he fails to show that the present federal questions were properly raised or resolved in the state courts. The only state appellate court "resolutions" made after Eggert first improperly asserted the factual and legal basis of his claims, were to *refuse* their consideration, and those resolutions were utterly silent

regarding the merits thereto. Pet. Cert. App. C, D, E. Eggert fails to present the Court with a judgment or opinion in which any state court adjudicated the merits of his claims (there is none); hence, Eggert's petition for the writ of certiorari should be denied. *Adams*, 520 U.S. at 86; *Radio Station WOW, Inc.*, 326 U.S. at 120, 128.[6]

B. **Eggert's claims are waived.**

Failure to follow appropriate state appellate rules to obtain review of a federal claim usually bars consideration of that claim in this Court. *Herndon v. Georgia*, 295 U.S. 441, 443 (1935) ("The long-established general rule is that the attempt, to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."); *see also Adams v. Robertson*, 520 U.S. at 89 ("[W]e have generally refused to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question."); *see also Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) ("Appellants did not present the issues squarely to the state courts until they filed their petition for rehearing with the Court of Appeal."). By filing his new evidence claims in a procedurally inappropriate manner, Eggert waived consideration of these claims in this Court.

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[6] In addition, Eggert fails to fully and properly discuss the manner in which his claims "were passed on by those [state] courts . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction. *See* Sup. Ct. R. 14.1 (g)(i).

III. In The Alternative, This Court Will Not Address Federal Claims Where the Possibilities of Review By All State Courts Have Not Been Exhausted.

As the Court held in *Gorman v. Washington University*, "no decision of a state court should be brought here for review either by appeal or certiorari until the possibilities of review by all state courts have been exhausted." 316 U.S. 98, 100 (1942). The purpose of the rule outlined in *Gorman* is "to prevent our interference with state proceedings when *the underlying dispute may be otherwise resolved.*" *Costarelli v. Massachusetts*, 421 U.S. 193, 196 (1975) (per curium) (emphasis added); *but cf. Largent v. Texas*, 318 U.S. 418, 421–22 (1943).[7]

Here, Eggert is required to raise the factual and legal basis of his claims—and the Texas Court of Criminal Appeals is permitted to *resolve* those claims—in a proper procedural context: by filing an application for state writ of habeas corpus.[8] Tex. Code Crim. Proc. art. 11.07 (West 2008); *see Whitehead v. State*, 130 S.W.3d at 872 (demonstrating that Texas appellate courts could not consider Eggert's "new evidence" for the first time on appeal). The state collateral proceeding is the

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[7] "The possibility that the appellant might obtain release by a subsequent and distinct proceeding, and one not in the nature of a review of the pending charge, in the same or a different court of the State does not affect the finality of the existing judgment or the fact that this judgment was obtained in the highest state court available to the appellant." *Largent v. Texas*, 318 U.S. at 421–22.

[8] Upon exhausting his claims in the state habeas proceedings, Eggert could seek redress in the federal courts—and ultimately this Court—by filing a petition for federal habeas corpus. *See* 28 U.S.C. § 2254.

appropriate venue to advance non-record allegations in support of a new constitutional claim.

While *Largent* suggests that the mere possibility a criminal defendant might obtain review of a federal claim in a subsequent proceeding (*e.g.*, habeas corpus), does not render an otherwise "final" judgment non-reviewable, where—as here—the state procedure requires resolution in that subsequent procedure, *Largent* should be inapplicable. *See Largent v. Texas*, 318 U.S. at 421–22.

Here, Texas (direct) appellate procedure bars Eggert from raising his claims in the manner he did below; hence, this Court should not resolve his federal claims until he gives the state courts an opportunity to address them, in a procedurally appropriate manner. *Gorman*, 316 U.S. at 100; *Costarelli*, 421 U.S. at 196.

IV. The State Is Unable To Address The "Merits" Of Eggert's Claims Because The Factual Bases Are Unauthenticated, And Because They Have Never Been Reviewed By Any Court.

Eggert makes several factual assertions in support of this petition. Because those assertions require further factual development, the State is unable address their underlying merits. The State will briefly address four of Eggert's factual contentions.

A. The "original" petit jury list.

No court has ever verified or authenticated the "original" petit jury list that Eggert first "discovered" and attached to his supplemental motion for rehearing.

Without such a determination, Eggert's claims are unsubstantiated. Indeed, even assuming, *arguendo*, the authenticity of the "original" petit jury list, without further factual development of Eggert's claims, no court can ever determine whether a"shuffle"—if any—was the result of a state act, or whether it was done with the consent, or at the request of trial counsel.

B. The "father" of the district attorney.

Eggert claims that the "father of the elected, but recused, district attorney" was seated on his venire-panel. Pet. Cert. at 12. This contention is unsupported, and has never been submitted to a tribunal for review.

The factual contention is particularly problematic because the venire-member spells his name differently than does the district attorney.[9]

C. The "daughter" of a grand-juror.

Eggert claims that the "daughter of a grand juror" was seated on his venire-panel. Pet. Cert. at 12. The trial transcript supports this contention, but also demonstrates that, (i) this relationship was disclosed to all parties during voir dire, (ii) that she did not know if her father's grand-jury was involved in Eggert's case, and (iii) her father had not discussed the case with her. 5 RR 66–67.

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[9] *See* Pet. Cert. App. at 38 (indicating that the venire-member spells his name "Terrell"); *see also*, Erath County District Attorney website, (visited October 22, 2008) <http://www.co.erath.tx.us/ips/cms/districtcourt/districtAttorney.html> (indicating that the district attorney spells his name "Terrill").

Indeed, it is conceivable that defense counsel believed that she would be a favorable juror, and wanted her to serve thereto.

D. A county court at law judge.

Eggert claims that the "judge of the county court at law" was seated on his venire panel. Pet. Cert. at 12. The trial transcript supports this contention, but also demonstrates that, all parties immediately recognized the county judge, and he was dismissed without objection (*i.e.*, defense counsel did not have to utilize a peremptory challenge). 5 RR 9, 11, 18, 24, 39–40, 75, 87.

CONCLUSION

On the basis of the foregoing arguments and authorities, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(3)

No. 08-27

Supreme Court, U.S.
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In The
Supreme Court of the United States

PETER HELLMUTH EGGERT,
Petitioner,

vs.

STATE OF TEXAS,
Respondent.

On Petition For Writ Of Certiorari
To The Texas Eleventh Court Of Appeals
Sitting In Eastland, Texas

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S QUESTIONS PRESENTED - *RESTATED*

1. Can the Texas Appellate Courts simply ignore allegations and proof of deprivation of a person's constitutionally guaranteed right to an impartial jury in a criminal case under the Sixth Amendment to the Constitution of the United States?

2. Did the Texas Courts violate Petitioner's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States?

RESPONDENT'S QUESTIONS IN OPPOSITION PRESENTED – *RESTATED*

1. Does the Court have jurisdiction under 28 U.S.C. § 1257(a) to review the Texas Eleventh Court of Appeals' decision below, denying Petitioner Eggert's supplemental motion for rehearing, in which Eggert first raised the claims presented here?

2. Should the Court grant a petition for a writ of certiorari where Petitioner failed to follow the appropriate state appellate rules to obtain review of his federal claims?

TABLE OF AUTHORITIES

Sixth Amendment
to the United States Constitution *2*

Supreme Court Rule 29.3 ..... *1*

Federal Cases

Richards v. Jefferson County, Ala.,
517 U.S. 793, 797 n. 3 (1996)..... *5*

Brinkerhoff-Faris Trust Co. v. Hill,
281 U.S. 673, 677-78 (1930)..... *5*

Estate of Wilson v. Aiken Industries, Inc.,
439 U.S. 877 (1978)..... *6*

Texas Cases

Eggert v. State,
No. 11-05-00234-CR (Tex.App.-Eastland,

Delivered June 7, 2007)
(not designated for publication). *4*

Gallardo v. State,
No. 11-04-00049-CR (Tex.App.-Eastland,
Sept. 30, 2004, no pet.). *2*

Texas Provisions and Statutes

Texas Penal Code Ann. 21.11(a)(2) (Vernon 2003)..... *2*

Report to the Supreme Court of Texas by the
Task Force on Jury Assembly and Administration.....*7*

Other

Supreme Court Practice, Eighth Edition;
The Bureau of National Affairs. Inc.;
ISBN 1-57018-224-8 .....*5*

OBJECTION

Petitioner respectfully objects to Respondent's *Brief in Opposition* because it is defective on its face in that, on the cover of the brief, Respondent wrongfully states:
"On Petition for Writ of Certiorari to the **Texas Court of Criminal Appeals**" when the petition at bar is clearly addressed to the **Texas Eleventh Court of Appeals, Sitting in Eastland, Texas.**[1]
Furthermore, Respondent only served 2 (two) copies of the brief to Petitioner, which is in violation of Rule 29.3.
Petitioner suggests that because of the aforesaid, and in light of the fact that Respondent did not file a waiver or response on the proper due-date and had to be directed by the Court to file such response, Respondent demonstrated disregard and confused handling of the serious matter before the Court.

MEMORANDUM

Respondent, in its *Brief in Opposition*, does not respond to the Questions Presented to the Court, but instead raises its own question of whether the Court has jurisdiction over the petition before the Court.

Respondent states that the Eleventh Court of Appeals for the State of Texas[2] was essentially barred by Texas procedural rules and case law from considering Petitioner's newly discovered evidence

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1 Emphasis added.
2 "11th COA"

of the violation of his constitutional Sixth Amendment right to an impartial jury because such new evidence was not part of the record and that there has never been any precedent which could have allowed the 11th COA to even address such new evidence.

Such statement is patently false, because:
On September 30, 2004, in *Gallardo v. State*,[3] the case which triggered all subsequent prosecution against Petitioner, including the case at bar, the 11th COA readily considered and commented in its opinion that:

> "In his third issue on appeal, appellant argues that 'new evidence' has been discovered that should be considered in reversing the judgment of the trial court. Appellant obtained a written statement from the chief of police at the time of the offense. The officer stated that he believed the incident between appellant [Gallardo] and the victim was 'consensual.' Appellant was convicted of indecency with a child by exposure. TEX. PENAL CODE ANN. '21.11(a)(2) (Vernon 2003). It is an affirmative defense if the actor was not more than three years older than the victim and if the actor did not use duress, force, or a threat against victim. [The penal code] does not require that the State show that the offense was committed without the consent of the victim. (Citations omitted). The 'new evidence' does not establish that appellant is

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3 Gallardo v. State, No. 11-04-00049-CR (Tex.App.—Eastland) September 30, 2004.

> innocent of the offense. (Citations omitted). Appellant's third issue on appeal is overruled. The judgment of the trial court is affirmed."

Nowhere in the aforesaid opinion does the 11th COA state that it could not, or would not, consider the *new evidence* because it had not been part of the record.

It appears thus that the 11th COA either has the discretionary power to consider matters outside of the record or that it creates such power whenever it deems appropriate.

Ironically, the Attorney General of Texas, as attorney for Respondent, actually confirms the legal impossibility of the allegations against Petitioner as set forth in the instant case (Cause No. CR12121) by the grand jury indictment, which declares:

> "The GRAND JURY, for the County of Erath, State of Texas, duly selected, empanelled, sworn, charged, and organized as such at the January Term, A.D., 2005, of the 266th Judicial District Court for said County, upon their oath presented in and to said Court at said term that PETER HELLMUTH EGGERT, hereinafter styled Defendant, on or about the 5th day of April, A.D., 2004, and before the presentment of this indictment, in the County and State aforesaid, did then and there, with intent to commit the felony offense of fabricating physical evidence, agreed with Mikel Peter Eggert that one of them would engage in conduct that would

> constitute said offense, to-wit: the said Peter Hellmuth Eggert, knowing that an official proceeding was pending, to-wit: **Cause No. 11-04-00049-CR in the Court of Appeals for the 11th District of Texas, entitled Marcus Gallardo v. State of Texas**, made, presented or used a record or document, to-wit: the purported affidavit of Kim Whiteley, or Michele Whiteley, with knowledge of its falsity and with intent to affect the course of outcome of the official proceeding described above." (emphasis added).

After Petitioner's recusal motion to the 11th COA[4] , Petitioner presented the following issue in his appeal brief and in his reply to the State's brief:

> "Was the evidence legally and factually sufficient to support a guilty verdict for conspiracy to fabricate evidence, where the State had to prove the affidavits were prepared with the intent to alter the proceedings in the Court of Appeals, **since the affidavits were not in the record, and could not have been considered by the Court?"** (Emphasis added).

To which the 11th COA replied in its unpublished opinion[5]

> "The State was not required to prove that this court could have considered the Whiteley

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[4] Petitioner's Recusal Motion was ultimately denied by the 11th COA.

[5] *Eggert v. State*, No. 11-05-00234-CR (Tex.App.—Eastland) June 7, 2007.

affidavits or that those affidavits would have affected the outcome of the Gallardo appeal."[6]

Petitioner respectfully emphasizes that the State of Texas cannot have it both ways.

In its Eighth Edition, the Supreme Court Practice[7] explains:

"There are situations where raising the federal question for the first time in the petition for rehearing is timely even though the state court says nothing in denying the petition. ... In all cases cited by the Court, the aggrieved party had made some kind of effort, such as filing a rehearing petition, to bring the new federal claim to the attention of the state court."[8]

Jurisdiction is proper and timely before the Court even though the state courts said nothing in denying or refusing the appeal.

Petitioner first brought the federal question in the case at bar immediately after he became aware of Respondent's violation of his constitutional right to an impartial jury in state trial court. The federal

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[6] It is noteworthy that the 11th COA did not even address the fact that the "affidavits" had not been part of the record. It is also noteworthy that in Petitioner's diligent research and observation of the 11th COA's rulings since 2004, Petitioner has not found a single criminal case which the appointed justices of the 11th COA have not affirmed.

[7] Supreme Court Practice, Eighth Edition; The Bureau of National Affairs, Inc.; ISBN 1-57018-224-8

[8] *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797 n. 3 (1996); *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-78 (1930.

question in the case at bar was unexpectedly discovered by Petitioner and Petitioner had no prior opportunity to anticipate or assert this particular federal question. Petitioner's Supplemental Motion for Rehearing in the proceedings before the Eleventh Court of Appeals of the State of Texas constituted the first and probably only chance to present the matter to any state court. The fact that the Texas appellate courts *simply* denied and/or refused Petitioner's federal question assertions effectively created an unexpected decision of the highest state courts.

Petitioner has exhausted every procedural avenue available to him and Respondent's insinuation that Petitioner should have first gone to jail and then raise the federal question in a *habeas corpus* proceeding is so absurd that it does not deserve any further comment in this reply memorandum.

In his concurring opinion in *Estate of Wilson v. Aiken Industries, Inc.*[9] Justice Blackmun wrote:

> "It is well established that certiorari will not be granted where a federal constitutional issue is raised here for the first time on review of a state-court decision. (citations omitted). There appears to be an exception to that rule, however, whenever the federal issue arose from an unanticipated ruling of the state court, the petition for rehearing presented the first opportunity to raise it, and that opportunity was seized."

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[9] *Estate of Wilson v. Aiken Industries, Inc.*, 439 U.S. 877 (1978).

This is a case of deliberate prosecutorial misconduct by "special prosecutor" Garry Lewellen and Respondent is now trying to defend such misconduct by its challenge to the jurisdiction of the Court.

The Texas Supreme Court's Task Force, on February 2, 2007, has established that:

> "... Lawyers have expressed suspicion that in certain Texas counties there may be official tampering with the jury process behind closed doors, which tilts the process in favor of one litigant and against another. Such concerns were expressed publicly at a meeting of the Supreme Court Advisory Committee on May 2005. ..."

The Task Force further stated that while it was "aware of no hard proof of malevolent [jury] tampering" its members were made aware of such ongoing abuse of fundamental justice by some officials in some counties.

Here, the 11th COA didn't even allow Petitioner a *Harm Analysis* hearing as required by the state appellate rules.

Petitioner also avers that Respondent's sole focus on the jurisdictional issue indicates that the state of Texas does not have any viable response to the true questions concerning the matters and issues in the instant cause.

CONCLUSION

For the reasons shown, Petitioner states that Respondent's allegation that the Court does not have jurisdiction is unfounded, directly contradicts the actions of the 11th COA, and does not invalidate Petitioner's constitutionally guaranteed right to an impartial jury.

Petitioner prays that his petition for writ of certiorari be granted and that Petitioner be allowed to fully brief the Court on all merits of the case.

Respectfully submitted,

s/s (Peter H. Eggert)

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